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Sup of Kretzinger & Field for  
Supreme Court of the United States,  
C. C. Bellows, Con. mo.

OCTOBER TERM, 1897.  
Filed Feb. 27, 1897.

THE LOUISVILLE TRUST COMPANY,

Appellant,

THE LOUISVILLE, NEW ALBANY  
RAILWAY COMPANY,

Office Superior Court, U. S.  
& CHICAGO  
FEB 27 1897  
JAMES H. McKENNEY,  
COMPANY, CLEAR.

THE LOUISVILLE BANKING

Appellant,

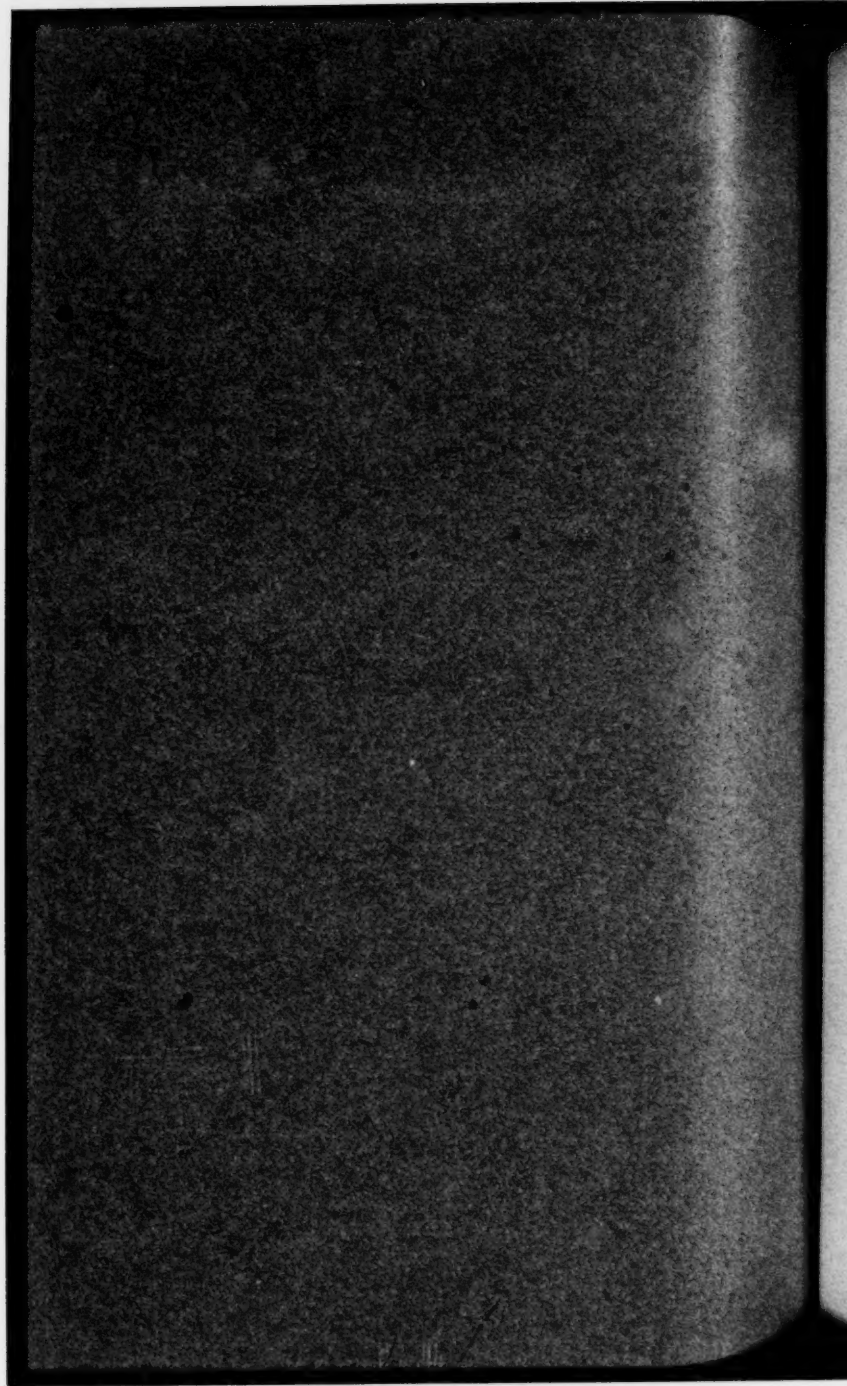
No. 645.

THE LOUISVILLE, NEW ALBANY & CHICAGO  
RAILWAY COMPANY.

Motion by Appellee to direct Circuit Court to Vacate  
Order, etc., Affidavit, Transcript of Record, and  
Points and Authorities in support thereof.

GEO. W. KRETZINGER,  
E. C. FIELD,  
JAMES S. PIRTLE,

For Louisville, New Albany & Chicago  
Railway Company, Appellee.



IN THE  
Supreme Court of the United States.

OCTOBER TERM, A. D. 1896.

THE LOUISVILLE TRUST COMPANY,  
*Appellant,*

*vs.*

No. 645.

THE LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY  
COMPANY.

THE LOUISVILLE BANKING COMPANY,  
*Appellant,*

*vs.*

No. 646.

THE LOUISVILLE, NEW ALBANY & CHICAGO RAILWAY  
COMPANY.

MOTION.

Upon due notice, made and filed with the clerk, now comes the Louisville, New Albany & Chicago Railway Company, by its counsel, and moves this Honorable court to direct the Circuit Court of the United States for the District of Kentucky, sitting at Louisville, to vacate an order entered by it, on the 14th day of November, 1896, therein and thereby dismissing the bill of the Louisville, New Albany & Chicago Railway Company, as to certain defendants thereto and acting upon other matters as shown in the moving papers submitted herewith in support of this motion, said order having been entered by said Circuit Court pending the petition in this court for the issuance of writs of *certiorari* in the above entitled causes and before said writs issued.

G. W. KRETZINGER,

E. C. FIELD,

JAMES S. PIRTLE,

*Solicitors for Louisville, New Albany &  
Chicago Railway Company, Appellee.*

THE ATTACHED, SUBMITTED IN SUPPORT OF THE FOREGOING MOTION CONSISTS IN:

- 1st. The affidavit of Geo. W. Kretzinger;
- 2d. The transcript of Circuit Court, showing motion on mandate and order entered thereon dismissing bill, and motion of appellee to vacate said order;
- 3d. Opinion of the Circuit Court on appellee's motion to vacate order;
- 4th. Points and authorities in support of the foregoing motion.

AFFIDAVIT IN SUPPORT OF MOTION.

George W. Kretzinger, on oath states that he is the general counsel of the appellee in the above entitled causes, and as such is fully authorized to make this affidavit.

For information to the court affiant submits herewith a transcript from the Circuit Court for the District of Kentucky which transcript contains:

1st. The order of said court entered November 14, 1896, dismissing appellee's bill of complaint as to part of the defendants thereto and executing the mandate of the Circuit Court of Appeals, as to the others.

2d. The mandate of the Circuit Court of Appeals upon which said order was made, said mandate having been issued out of the Circuit Court of Appeals of date June 22, 1896, and filed in said Circuit Court at Louisville for the District of Kentucky on November 14, 1896, the same being the date of the entry of said order therein dismissing, etc., as aforesaid.

3d. Motion by the above appellee, as plaintiff in the

Circuit Court, to set aside said order so made and entered November 14, 1896, as aforesaid.

4th. And in support of said motion in said Circuit Court as appears in said transcript the above appellee filed and presented to said court:

(a) The order of this court made and entered November 16, 1896, therein directing the issue of writs of *certiorari* in the above entitled causes.

(b) The affidavit of affiant therein stating and setting forth the steps taken in the application to this court for the issue of said writs of *certiorari* and the stipulation made by counsel for the above appellants with reference thereto.

And affiant here refers to said affidavit and asks that it may be examined and considered at this point and herewith to save repetition.

The dates of steps and proceedings taken and had as shown in the record and attached transcript, were and are as follows :

1st. The Circuit Court of Appeals handed down its opinion of reversal in the above causes on the 22d day of June, 1896.

2d. Appellee filed its petition for rehearing within the period fixed by special order of the Circuit Court of appeals, which petition was denied October 5, 1896. (Rec. 219.)

3d. On the same day and immediately following the denial of the said petition, appellee, by counsel, moved the Circuit Court of Appeals to stay its mandate, pending

application to this court for writ of *certiorari*, and said court refused to take or consider said motion and no entry thereof was made or ordered.

4th. On October 15, 1896, appellee filed with the clerk of the Circuit Court of Appeals a stipulation with counsel for appellants which constituted an agreed praecipe for the record upon which the application for writs of *certiorari* was to proceed in this court, said stipulation being addressed to the clerk of the Circuit Court of Appeals, and among other things in its direction providing, to wit:

“ *Frank E. Loveland, Clerk.*

SIR: In making a transcript of the record herein to be used by the appellee upon motions in the Supreme Court of the United States for writs of *certiorari* herein, you will follow the directions contained in the stipulation of parties this day filed in your office. The transcript under the above named directions will include” \* \* \*.

(See stipulation, Rec., 219.)

5th. On the same day, to wit: the 15th day of October, 1896, another stipulation between counsel for appellants and appellee was filed with the clerk of the Circuit Court of Appeals and was certified to this court, said stipulation being as follows, to wit:

“ It is agreed between the appellants and the appellee herein, that the said appellee may take the record in the case of the *Louisville Trust Company* against the appellee, and the record in the case of *Louisville Banking Company* against the appellee, omitting all matter re-

ferring exclusively to the cases of the other appellants in this record, in making up the record for the application by appellee to the Supreme Court of the United States for a writ of *certiorari*; and,

“ It is further agreed that the determination of the motion for *certiorari* in said two cases shall control in all the other cases not specially named, and if the Supreme Court of the United States shall cause the writ to issue, the affirming or reversing by the Supreme Court of the United States of the judgment of the Circuit Court of Appeals in the Sixth Circuit in the said two specially named cases shall have the same effect as if all the said cases not specially named had been removed by writ of *certiorari* to the Supreme Court of the United States and by said court affirmed or reversed, and the same order of affirmation or reversal shall be entered in all the cases, as well those specially named as those not specially named.

“ It is further stipulated by the appellants and appellee that in making up the record herein for the purpose of said motions for writs of *certiorari* as aforesaid the clerk of the court shall omit from the record the answers of all the appellants except the two above specially named and their several proceedings for an appeal taken in the United States Circuit Court, District of Kentucky.

“ It is further stipulated and agreed that the said motions in the Supreme Court of the United States and said cases, if the motions should be granted, shall be heard upon the record stipulated as above, for the reason that

the pleadings and proceedings in the said two cases of the Louisville Trust Company, appellant, and the Louisville Banking Company, appellant, against the Louisville, New Albany & Chicago Railway Company, appellee, present the full issues involved in this record."

(Endorsed on back): United Circuit Court of Appeals, sixth circuit. *Louisville Trust Company et al., appellants, v. Louisville, New Albany & Chicago Railway Co., appellee.* Agreement. Filed October 15, 1896. Frank O. Loveland, Clerk."

(See Stipulation, Rec., 221.)

6th. The transcript of the record, made as stipulated and so certified, was filed in the office of the clerk of this court on November 9, 1896, and motion was made thereon on the same date for the issue of writs of *certiorari* as prayed in the petition therefor.

7th. November 14, 1896, the above appellants filed in the Circuit Court the mandates of the Circuit Court of Appeals, and thereon on the same day, the judge of said Circuit Court, having been advised of appellee's application and its pendency in this court for said writs, dismissed appellee's bill of complaint as to part, and otherwise executed the mandate as to the other defendants thereto. (See transcript hereto attached.)

8th. Two days thereafter, to wit: on November 16, 1896, this Honorable Court ordered said writs to issue, which were in due form served upon and filed with the clerk of the Circuit Court of Appeals, and with the clerk of the Circuit Court for the District of Kentucky.

9th. About November 23, 1896, the stipulation of

counsel for appellee with counsel for appellants was filed with the clerk of the Circuit Court of Appeals, therein agreeing (in substance) that the printed transcript filed in this court on November 9, 1896, should constitute the record upon which the cause under the writs of *certiorari* issued upon such record should be heard and determined by this court, and that said stipulation might constitute a return of the clerk of the Circuit Court of Appeals upon said writs of *certiorari* to this court.

(See stipulation endorsed upon or attached to said writs of *certiorari*, so certified by the clerk of the Circuit Court of Appeals now on file in this court in the above cause.)

And to show the disposition of said motion by appellee to vacate said order so dismissing its bill as aforesaid, affiant attaches hereto and submits herewith the opinion of the Circuit Court in its consideration of said motion, in and by which opinion said Circuit Court refuses to decide said motion until appellee presents the motion here offered to this Honorable court for direction and instruction to said Circuit Court, said Circuit Court having expressed the same in its opinion as follows, to wit:

“We will not, however, overrule the motion, but leave it undisposed of until the question is definitely settled as to the power of the court.”

Affiant further states that appellee was present by counsel in the Circuit Court of Appeals on the 5th day of October, 1896, at and when its petition for a rehearing in the above entitled causes was denied by said Court of Appeals, and that then and there, while said mandate

was still in the said Court of Appeals and had not been sent down to said Circuit Court for action, appellee's counsel moved said Court of Appeals to retain and stay the mandate, until appellee might present its petition to this court for a writ of *certiorari* as it then proposed to and thereafter did, and that said Court of Appeals by its then and there acting Chief Justice, refused to take or consider said motion, and that thereafter the foregoing stipulations were made and entered into by and between the counsel for appellee and counsel for appellants, by which stipulation it was expressly agreed that the above entitled causes should be tried upon the record as therein expressly agreed, provided writs of *certiorari* were ordered to issue as aforesaid.

G. W. KRETZINGER.

Subscribed and sworn to before me this twenty-fourth day of February, 1897.

WM. S. KINNAN,

[SEAL.]

*Notary Public.*

# TRANSCRIPT.

UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF  
KENTUCKY.

NOVEMBER, 14, 1896.

The Louisville, New Albany & Chi- Railway Co.,	}
<i>Complainants,</i>	
<i>vs.</i>	
The Ohio Valley Improvement Co., &c.,	}
<i>Defendants.</i>	

This day came the defendants, the Louisville Trust Company, W. C. Nones and Bernard Hollman, by St. John Boyle, their counsel; and also came the Kentucky National Bank, by Humphrey & Davie, its counsel; and also came the Louisville Banking Company and Theodore Harris, by Barnett, Miller & Barnett, their counsel; and also came Ben C. Weaver, Jr., John H. Leathers, James A. Shuttleworth, John T. Bate, Jr., M. A. Huston, A. J. Ross, W. M. Charleton, B. A. Duerson, Ronald Whitney, R. L. Whitney, S. A. Cannon, W. H. Dillingham, and Abraham Schwabacker, by Noble & Sherley, their counsel, and the opinion of the United States Circuit Court of Appeals for the Sixth Circuit, upon the appeals prosecuted by the said defendants, and the mandates of the Circuit Court of Appeals thereon having been duly filed in this court, it is now, upon motion of the said parties, ordered that the bill of complaint of the said defendant be and it is hereby dismissed as to each of the said defendants, except as follows:

In case of the Louisville Banking Company, it is ordered that the decree heretofore entered be set aside, and the said defendant is directed to produce the forty-five bonds of the Richmond, Nicholasville, Irvine and Beattyville Railroad Company mentioned and described in the answer of the said defendant, and the clerk of this court shall thereupon stamp or write thereon, under the guaranty of the complainant, the Louisville, New Albany and Chicago Railway Company, the following words:

“ This guaranty is binding only on the Louisville, New Albany & Chicago Railway Company as a corporation of Kentucky. It is not binding on the Louisville, New Albany & Chicago Railway Company as a corporation of Indiana or Illinois.” And the said defendant is hereby enjoined and restrained from bringing or prosecuting any suit on the said bonds against the complainant as a corporation of Indiana or Illinois.

And in the case of the Kentucky National Bank, it is ordered that the decree hereinbefore entered be set aside, and the said defendant is directed to produce in court the five bonds of the Richmond, Nicholasville, Irvine and Beattyville Railroad Company, mentioned in the said defendant's pleading, and deposited and pledged to it by William Cornwall. And the clerk of the court shall thereupon stamp or write thereon, under the endorsement of the complainant's guaranty the following : “ This guaranty is binding only on the Louisville, New Albany & Chicago Railway Company as a corporation of Kentucky. It is not binding on the Louisville, New Albany and Chicago Railway Company as a corporation of Indiana or Illinois.” And the said defendant is hereby enjoined and

restrained from bringing or prosecuting any suit on the said bonds against the complainant as a corporation of Indiana or Illinois.

And with respect to the five bonds deposited and pledged to the said defendant by W. W. Jenkins, the bill of complaint will be dismissed without prejudice, unless the complainant shall within thirty days from the entry hereof amend the said bill, and make the said W. W. Jenkins a party thereto, in which event the case will be retained for further proceedings in regard thereto.

With respect to the eight similar bonds deposited and pledged to the said defendant, the bill of complaint is dismissed, and in case of each of the said defendants before mentioned, as to whom the bill is dismissed, it is done at the cost of the complainant; and it is now ordered, adjudged and decreed that each of the said defendants recover of the complainant their costs in this suit expended.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE  
SIXTH CIRCUIT.

November 14, 1896.

UNITED STATES OF AMERICA, }  
SIXTH JUDICIAL CIRCUIT. } ss.

THE PRESIDENT OF THE UNITED STATES.

*To the Honorable, the Judge of the Circuit Court of the  
United States for the District of Kentucky, Greeting:*

WHEREAS, lately in the Circuit Court of the United States for the District of Kentucky, before you, in a cause between the Louisville, New Albany & Chicago Railway Company, complainant, and the Louisville Banking Company, respondent, wherein a decree was entered on the 11th day of December, 1894, as by the inspection of the transcript of the record of the said Circuit Court which was brought into the United States Circuit Court of Appeals for the Sixth Circuit by virtue of an appeal agreeably to the act of Congress, in such cases made and provided, fully and at large appears.

AND WHEREAS, in the present term of October in the year of our Lord One thousand, eight hundred and ninety-five, the said cause came on to be heard before the United States Circuit Court of Appeals for the Sixth Circuit, on the said transcript of record, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now, here ordered; adjudged and decreed by this court, that the de-

cree of the said Circuit court in this cause be and the same is hereby reversed at costs of the appellee with directions to take further proceedings in accordance with the opinion.

JUNE 22, 1896.

You, therefore are hereby commanded that such proceedings be had in said cause, in conformity with the opinion and decree of this court as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

WITNESS, the Honorable Melville W. Fuller, Chief Justice of the United States, the 8th day of October, in the year of our Lord one thousand eight hundred and ninety-six.

COSTS OF APPELLANT:

Clerk,	\$30 10
Printing record,	24 28
Attorney	20 00

————  
\$74 38

FRANK O. LOVELAND,  
Clerk of the United States  
Circuit Court of Appeals  
for the Sixth Circuit.

[SEAL.]

(Endorsement): United States Circuit Court of Appeals for the Sixth Circuit. No. 281, October term, 1895. *Louisville Banking Company v. New Albany & Chicago R. R. Co.* Mandate, filed November 14, 1896.

THOS. SPEED, *Clerk.*

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UNITED STATES CIRCUIT OF APPEALS FOR THE SIXTH  
CIRCUIT.

NOVEMBER 14, 1896.

UNITED STATES OF AMERICA, }  
SIXTH JUDICIAL CIRCUIT. } ss.

THE PRESIDENT OF THE UNITED STATES.

*To the Honorable, the Judge of the Circuit Court of the  
United States for the District of Kentucky,* GREETING:

Whereas, lately in the Circuit Court of the United States for the District of Kentucky, before you, or some of you, in a cause between the Louisville, New Albany & Chicago Railway Company, complainant, and the Ohio Valley Improvement and Contract Company, respondent, wherein a decree was entered on the 11th day of December, 1894, as by inspection of the transcript of the record of the said Circuit Court which was brought into the United States Circuit Court of Appeals for the Sixth Circuit by virtue of an appeal, agreeably to the act of Congress, in such cases made and provided, fully and at large appears.

AND WHEREAS, in the present term of October, in the year of our Lord one thousand eight hundred and ninety-five, the said cause came on to be heard before the said United States Circuit Court of Appeals for the Sixth Circuit on the said transcript of record, and was argued by counsel:

ON CONSIDERATION WHEREOF, it is now here ordered, adjudged and decreed by this court that the decree of the

said Circuit Court in this cause be and the same is hereby reversed, with costs and directions to dismiss the bill as to this appellant.

June 22, 1896.

You, therefore, are hereby commanded that such proceedings be had in said cause, in conformity with the opinion and decree of this court, as, according to right and justice and the laws of the United States, ought to be had, the said appeal notwithstanding.

WITNESS the Honorable Melville W. Fuller, Chief Justice of the United States, the 8th day of October, in the year of our Lord one thousand eight hundred and ninety-six.

Costs of appellant.

Clerk	\$31.85
Printing record	24.28
Attorney	20.00
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	\$76.13

FRANK O. LOVELAND,  
Clerk of the United States  
Circuit Court of Appeals  
for the Sixth Circuit.

[SEAL.]

(Endorsement): United States Circuit Court of Appeals for the Sixth Circuit. No. 277, October Term, 1895. *Louisville Trust Co. v. Louisville, New Albany & Chicago Railway Co.* Mandate. Filed November 14, 1896. Thos. Speed, Clerk.

## UNITED STATES CIRCUIT COURT DISTRICT OF KENTUCKY.

DECEMBER 1, 1896.

Louisville, New Albany and Chicago Railway Company  
v.  
Louisville Trust Company, etc.

Came complainant, by counsel, and filed herein a copy of the order of the Supreme Court of the United States granting writ of *certiorari* to the United States Circuit Court of Appeals, Sixth Circuit, in this cause, and thereupon the complainant, by counsel, moved the court to set aside the orders entered herein on the 14th day of November, 1896, to which the defendants, by counsel, objected, and said motion was submitted, and, the court not being advised, takes time.

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## SUPREME COURT OF THE UNITED STATES.

Nos. 645 and 646, October Term, 1896.

The Louisville Trust Company,	}
<i>Appellant,</i>	
<i>vs.</i>	
The Louisville, New Albany & Chi-	}
cago Railway Company.	

The Louisville Banking Company,	}
<i>Appellant,</i>	
<i>vs.</i>	
The Louisville, New Albany and Chi-	}
cago Railway Company.	

ON A PETITION for writs of *Certiorari*, to the United States Circuit Court of Appeals for the Sixth Circuit.

ON CONSIDERATION of the petition for writs of *Certiorari* herein to the United States Circuit Court of Appeals, for the Sixth Circuit, and of the argument of counsel, in support of the same.

It is now here ordered by the court that said petition be and the same is hereby granted.

November 16, 1896.

A true copy.

Test: JAMES H. MCKINNEY,

[SEAL.] *Clerk of the Supreme Court of the United States.*

IN THE CIRCUIT COURT OF THE UNITED STATES FOR  
THE DISTRICT OF KENTUCKY.

Louisville, New Albany and Chicago Railway Company	}
<i>vs.</i>	
Louisville Trust Company <i>et al.</i>	}

George W. Kretzinger, on oath states that he is the general counsel of the above complainant, and as such is fully authorized to make this affidavit.

Affiant further states that on the 22d day of June, 1896, the Circuit Court of Appeals for the Sixth Circuit, by its decision on that date rendered, reversed the decree of this court, and thereafter, to wit: on October 5, 1896, the petition for a rehearing of said cause by said Circuit Court of Appeals was overruled and the motion to modify the mandate was denied; that thereafter, to wit: on the 12th day of October, 1896, the defendants in the above entitled cause, as appellants in the Circuit Court of Appeals, were notified by written notice that the Louisville, New Albany and Chicago Railway Company would on the 9th day of November, 1896, file its petition in the Supreme Court of the United States and move thereon for the issuance of a writ of *certiorari* to said Circuit Court of Appeals, said notice and the acceptance thereof being hereto attached marked Exhibit A. And thereafter, to wit: on October 15, 1896, a certain stipulation was made touching the preparation of the record to be certified by the clerk of the Circuit Court of Appeals to the Supreme Court, upon which the petition and motion for writ of

*certiorari* should proceed, and also providing in said stipulation that if the writ issued the cause should be heard and considered by the Supreme Court upon said agreed record, a copy of said stipulation being hereto attached marked Exhibit B; that said stipulation was certified into said record by the Clerk of the Circuit Court of Appeals as the same now appears on file in the Supreme Court, pursuant thereto and in conformity therewith.

Affiant further states that said record was made up and certified by the Clerk of said Circuit Court of Appeals pursuant to said stipulation and another stipulation of numerous other matters to be contained in said record signed by counsel of the same date; that thereafter, to wit: on November 9, 1896, said record and thereon the petition and motion for a writ of *certiorari* as in said petition prayed were filed in said Supreme Court, and the said motion for said writ upon said petition and record were then and there submitted to said Supreme Court for its consideration and decision, a copy of said motion being hereto attached, marked Exhibit C; that one week after said submission, to wit: on the 16th day of November, 1896, said Supreme Court granted said motion and ordered the issuance of said writ, which more fully appears in the certified copy of said order now on file in the above entitled cause in this court, to which reference is hereby made; that two days before the entry of said order in the said Supreme Court, to wit: November 14, 1896, and upon the mandate of said Circuit Court of Appeals and on motion of counsel for appellants in said mandate, this Honorable court entered judgment in the above entitled cause, dismissing the bill

of complaint; that said writ was promptly issued and sent by the clerk of the Supreme Court to affiant, and upon its receipt affiant mailed the same to James S. Pirtle, at Louisville, Kentucky, he being one of counsel of the Louisville, New Albany & Chicago Railway Company in the above entitled cause, and affiant is informed that the said writ was sent by said Pirtle to the clerk of the Circuit Court of Appeals with a stipulation to the effect that the record so certified by him and filed in the Supreme Court as aforesaid, should constitute his return to said writ; that thereafter, to wit: on December 1, 1896, complainant by counsel appeared in this Honorable Court and moved that said order or judgment of dismissal be set aside, and this affidavit is made in support of said motion, and so as to submit to this court the various steps taken and their respective dates.

G. W. KRETZINGER.

Subscribed and sworn to before me, on this 2nd day of December, 1896.

WM. S. KINNAN,

[SEAL.]

*Notary Public.*

(The exhibits above referred to are the stipulations heretofore set out, and therefore are here omitted.)

[Certificate of clerk of Circuit Court, for District of Kentucky.]

## UNITED STATES CIRCUIT COURT, DISTRICT OF KENTUCKY.

L. N. A. & C. Ry. Co.    }  
                   *vs.*  
 Louisville Trust Company. }

## OPINION ON MOTIONS.

The Louisville, New Albany & Chicago Railway Company obtained a judgment against the Louisville Trust Company and others in this court, which declared that a guaranty which was endorsed upon certain coupon bonds issued by the Richmond, Nicholasville & Beattyville Railway Company, by said Louisville, New Albany & Chicago Railway Company was *ultra vires* and invalid, and which directed that the guaranty thereon should be canceled, and the injunction which was originally granted, preventing the transfer of said bonds with the guaranty thereon, was made perpetual. From this judgment the Louisville Trust Company and others, holders of said bonds appealed to the Circuit Court of Appeals, and that court reversed the judgment of this court, holding that the guaranty was invalid as to the appellants, and directed by mandate that the bills filed by the L., N. A. & C. Ry. Co., should be dismissed with costs. The mandates of the Circuit Court of Appeals in the several cases were dated October 8, 1896, and filed in this court on November 14, 1896, and on the same day, pursuant to and in obedience to said mandates, on motion of the appellants, an order was entered by this court dismissing the bills, with costs in favor of the several appellants except the Louisville Banking Company, the Kentucky National

Bank and W. W. Jenkins. On December 1, 1896, the L., N. A. & C. Ry. Co. filed an affidavit of its counsel, together with a copy of the order of the Supreme Court of the United States granting a writ of *certiorari* to the United States Circuit Court of Appeals for this circuit in the cause, and moved this court to set aside the order of dismissal entered on the 14th of November, 1896. This affidavit is accompanied with a copy of said order as stated, attested by the clerk of the Supreme Court of the United States, showing that the writ of *certiorari* was granted on the 16th day of November, 1896, to the Circuit Court of Appeals of this circuit. It also appears from the statement of said affidavit that notice of the fact that an application would be made on the 9th day of November, 1896, to the Supreme Court by the L. N. A. & C. Ry. Co. for a writ of *certiorari* was accepted by counsel for defendants on the 12th of October, 1896, and that such motion was made on the 9th of November, 1896, to the Supreme Court of the United States and granted on the 16th of November, 1896. When the original bill was filed against the several parties an injunction bond was executed by the complainant, the Louisville, New Albany and Chicago Railway Company to the several parties who were then defendant, the condition of which was that the obligors therein would pay to the obligees, or such of them as might be damaged by the injunction then granted, such damages as they, he or it might sustain by reason of the issuing of said injunction, if it be finally decided that said injunction ought not to have been granted; and when the bill was amended bringing

in other parties, another injunction bond was executed by complainant, with security conditioned as in the first bond. On the second of February, 1897, the defendants, The Louisville Trust Company and others, obligees in the said injunction bonds, moved the court to refer the case to a special master to hear and determine as to what damage, if any, said obligors of said bond shall pay to said obligees therein and report the same to the court for action thereon. Both of these motions have been submitted.

It will be seen from this brief statement of the facts that the writ of *certiorari* which issued from the Supreme Court was issued to the Circuit Court of Appeals and not to this court, nor has that court made any order upon this court in regard to its action. The motion of the Louisville, New Albany & Chicago Railway Company, to have this court set aside the order entered on the 14th of November, 1896, is upon the theory that this court still has control over the judgment then entered, as the motion to set it aside was made during the same term, and that the effect of the *certiorari* issued by the Supreme Court of the United States upon the Circuit Court of Appeals is to set aside the action of the Circuit Court of Appeals, and the action of this court thereunder, and leave the cause as if it had gone up upon appeal directly to the Supreme Court.

We have been unable to find any ruling of the Supreme Court or any established practice in regard to the effect upon the trial court of a writ of *certiorari* granted as in this case. The act of March 3, 1891, provides that "whenever on appeal or writ of

error or otherwise a case coming directly from the District Court or existing Circuit Court shall be reviewed and determined in the Supreme Court, the cause shall be remanded to the proper District or Circuit Court for further proceedings to be taken in pursuance of such determination." "Whenever on appeal or writ of error, or otherwise, a case coming from a District or Circuit Court, shall be reviewed and determined in the Circuit Court of Appeals in a case in which the decision in the Circuit Court of Appeals is final, such cause shall be remanded to the said District or Circuit Court for further proceedings to be taken in pursuance of such determination." And it provides in another section: "That in any case as is hereinbefore made final in the Circuit Court of Appeals it shall be competent for the Supreme Court to require, by *certiorari* or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court." And in another provision: "Whenever on appeal or writ of error or otherwise a case coming from a Circuit Court of Appeals shall be reviewed and determined in the Supreme Court, the cause shall be remanded by the Supreme Court to the proper District or Circuit Court for further proceedings in pursuance of such determination." Thus the act of Congress gives the Circuit Court of Appeals in those cases over which they have appellate jurisdiction and can enter a final judgment, plenary power to remand the case to the inferior court with such direction as they might determine. This mandate thus entered must be

obeyed by the inferior court unless it has been suspended or superseded by a *certiorari* from the Supreme Court for the purpose of review or determination. This statute, whilst it gives full power to the Supreme Court to remand to the trial court for such proceedings as may be proper to carry out the final judgment of that court is silent as to what should be done in the interim between the adjudication by the Circuit Court of Appeals and the final adjudication by the Supreme Court. It must, of necessity, be still a pending suit, and the parties must by the terms of the act of 1891 be subject to the final adjudication of the Supreme Court. Here we have an injunction granted originally by the trial court and the relief granted upon final hearing, the case taken to the Circuit Court of Appeals and there an adjudication reversing the case with a mandate issuing from that court directing this court to dismiss the bill, and with it the injunction, with costs, and the enquiry is whether this court can now whilst the case is pending in the Supreme Court set aside this order entered under the mandate of the Circuit Court of Appeals.

At common law the writ of *certiorari* is used for two purposes, first as an appellate proceeding for the re-examination of some action of an inferior tribunal and second as an auxiliary process to enable the court to obtain further information in respect to some matter already before it for adjudication. It is for the latter purpose that the writ has been usually employed by the Supreme Court. The removal of a proceeding by writ of *certiorari* at common law might have been both before and after

final judgment. Here by the terms of the statute the Supreme Court has the same authority over a cause removed by *certiorari* as if it had been carried there by appeal or writ of error. The authorities at common law seem to differ somewhat as to whether in addition to the writ of *certiorari* an order of *supersedeas* should be issued to or by the inferior court. Perhaps the better authorities are that the *certiorari* when awarded and notice thereof given was in itself a *supersedeas*. We think this is the effect of the *certiorari* granted under the act of 1891 by the Supreme Court.

In the case of *Ewing v. Thompson*, 43 Penna. St., Rep., Judge STRONG, afterwards Justice STRONG of the Supreme Court, in discussing the effect of a writ of *certiorari*, speaking for the Pennsylvania Supreme Court, says:

"Very many English as well as American authorities are collected in *Patchen v. the Mayor of Brooklyn*, 13 Wend., 664. There are very many others all holding a common law writ of *certiorari*, whether issued before or after judgment, to be in effect a *supersedeas*. There are none to the contrary. In some of them it is ruled that action by the inferior court after the service of the writ is erroneous, in others it is said to be void and punishable as a contempt. They all, however, assert no more than the power of the tribunal to which the writ is suspended by it, that the judicial proceedings can progress no further in the lower court."

In *McWilliams v. King*, 32 N. J. L., 23, it is held, that at common law a *supersedeas* was issued by the in-

ferior court after the *certiorari* was awarded, but the New Jersey practice was for the superior court to issue the *supersedeas*. And the court, in the course of its opinion, said: "But it is to be remembered that the writ of *certiorari* is of itself and *proprio vigore* a *supersedeas*. Neither the inferior court nor the officer holding the process of such inferior court can rightfully proceed after formal notice of its having been issued. Every act done after such notice is not only irregular but absolutely void, and the parties doing such acts are trespassers."

See also,

2d Hawkins, P. C., p. 400 to 406.

1 Bacon's Abridgment, *Certiorari*, G.

Comyn's Digest, *Certiorari*, G.

It would seem from this view that after a *certiorari* was issued by the Supreme Court the authority and power of the Circuit Court of Appeals over the proceedings was at least suspended. I find in the *Union Pacific Railway Co. v. Chicago*, 163 U. S., 543, this language used by the Supreme Court in noticing a point, which had not been raised in the Circuit Court nor assigned for error to the decree in the Circuit Court of Appeals, viz.: "It is indeed admitted that the point is raised for the first time in this court. We have to determine in this appeal whether in our judgment the Circuit Court of Appeals did or did not err, and affirm or reverse accordingly. It is true that our decision necessarily reviews the decree of the Circuit Court in reviewing the action of the Court of Appeals upon it, and under the statute our mandate goes to the Circuit Court directly, but it is notwithstanding

the judgment of the Circuit Court of Appeals that we are called upon primarily to review. It will be seen, then, that the judgments of the Circuit Court of Appeals should not ordinarily be re-examined on the suggestion of error in that court, in that it did not hold the action of the Circuit Court erroneous, which was not complained of. We will, however, make a few observations on the point thus tardily presented." In this case there was an *appeal* from the Circuit Court of Appeals.

In the case of *Telfener v. Russ*, 162 U. S., 170, a writ of *certiorari* was issued by the Supreme Court to the Circuit Court of Appeals, and the case brought there in that way. In that case the judgment of the Circuit Court was affirmed by the Circuit Court of Appeals and reversed by the Supreme Court. The order is that "the judgment of the Circuit Court of Appeals should be reversed, and the cause remanded with directions to set aside the verdict and grant a new trial." It does not appear from the report of the case whether the mandate went to both the Circuit Court of Appeals and the Circuit Court, or only to the Circuit Court.

We conclude in the absence of any ruling or decision of the Supreme Court, that the effect of a *certiorari* when awarded in a cause decided by the Circuit Court of Appeals is to suspend any action that that court may take or any action that might be taken by the trial court in obedience to the mandate of the Circuit Court of Appeals after the *certiorari* is awarded, but it does not restore jurisdiction to the Circuit Court, nor does it give that court any authority to set aside orders legally and prop-

erly made before the writ of *certiorari* is awarded. It however suspends any further action by the Circuit Court of Appeals or by the trial court in obedience to the adjudication of the Circuit Court of Appeals after the writ has been awarded, or at least when the court is notified of the issuing of the writ of *certiorari* by the Supreme Court and its service upon the Circuit Court of Appeals.

It may be that in this case the original complainants may suffer loss and inconvenience by the condition in which this record is, and it might be desirable for some rule to be established by the Supreme Court or the Circuit Court of Appeals, by which the judgment of the Circuit Court might be suspended upon proper conditions when there is to be an application for a writ of *certiorari* to the Supreme Court, but we are strongly inclined to the opinion that this court in the present condition of the record cannot grant the order to set aside the judgment entered dismissing the complainant's bill. We will not, however, overrule the motion but leave it undisposed of until the question is definitely settled as to the power of the court.

The fact that notice for an application for a writ of *certiorari* was accepted by the counsel for defendants on the 12th of October, 1896, and the motion had actually been made in the Supreme Court before the order of dismissal was entered, does not, we think, affect the question of the court's authority now to set aside such order.

The motion of the defendants of the 2d of February, to refer these cases to have the damages ascertained, must, for the reason already given, be overruled, and for

the further reason that, by the terms of the injunction bond, damage was only to be recovered if it be *finally* decided that the injunction ought not to have been granted, and in this case it has not been finally decided, but is still pending in the Supreme Court. We do not now express any opinion as to whether or not damages could be ascertained in the mode suggested by this motion.

This motion of defendants will be overruled, and no order made in the other motion at present.

### **Points and Authorities in Support of the Foregoing Motion.**

This motion is most important because it involves a question of practice which may frequently arise under the Court of Appeals act, but which has not yet been determined by this court. Thus the Circuit Court retained and continued appellee's motion to vacate the order dismissing its bill to permit this motion to be made for the direction and instruction by this court to the Circuit Court, which will establish the proper practice in like proceedings had in the future under that act.

It is manifest, that if it is the opinion of this court that appellee would lose no rights if this court should reverse the judgment of the Court of Appeals and affirm the decree of the Circuit Court, notwithstanding the dismissal of appellee's bill under the mandate of the Circuit Court of Appeals, no necessity for the allowance of this motion would exist. But if the intervention of several terms of the Circuit Court between the order of dismissal and final action by this court if favorable to appellee would in any wise complicate or embarrass the execution of the final mandate of this court in the Circuit Court, appellee ought to be relieved therefrom by the allowance of its motion to direct the Circuit Court to restore its bill, *but in either view*, the practice under the Court of Appeals act should be fully settled by this court upon this motion.

## I.

1st. The record came to this court from the Court of Appeals under stipulation as to what it should contain and under the further stipulation that if this court ordered the issue of the writs of *certiorari* then these causes should be reviewed and determined upon such stipulated record.

2nd. November 9, 1896, appellee filed its stipulated record in this court, with its petition and motion thereon for writs of *certiorari* and on that day the motion for such writs was made and taken under advisement.

3d. November 14, 1896, and during the pendency of the motion in this court for the issuance of the writs of *certiorari* the Circuit Court, pursuant to the mandate of the Court of Appeals dismissed appellee's bill and at the same term of the Circuit Court appellee moved to vacate such order of dismissal.

4th. Two days after the entry of this order of dismissal, to wit: on November 16, 1896, this court ordered the writs to issue, and the decree with certified copy of the order therefor were promptly filed in the Circuit Court and Court of Appeals.

In this state of the case the Circuit Court held that under the mandate of the Circuit Court of Appeals it had no discretion but was compelled to dismiss the bill as therein directed and was without authority to vacate the order of dismissal upon appellee's motion notwithstanding the issue of the writs of *certiorari* without direction and instruction from this court, which the Circuit Court will await before further action upon appellee's motion to restore its bill to the record, there to remain pending the review and final disposition of the case by this court.

" It may be that in this case, the original complainants

may suffer loss and inconvenience by the condition in which this record is, and it might be desirable for some rule to be established by the Supreme Court of the Circuit Court of Appeals, by which the judgment of the Circuit Court might be suspended upon proper conditions when there is to be an application for a writ of *certiorari* to the Supreme Court, but we are strongly inclined to the opinion that this court in the present condition of the record cannot grant the order to set aside the judgment entered, dismissing the complainant's bill. *We will not however overrule the motion* but leave it undisposed of *until* the question is definitely settled as to the power of the court."

The effect of the opinion of the Circuit Court justifies the Court of Appeals in its refusal upon appellee's motion to stay its mandate, and there are no express words in the Court of Appeals Act which would sustain a contrary view. In its opinion upon this point, the Circuit Court said :

"This statute, whilst it gives full power to the Supreme Court to remand to the Trial Court for such proceedings as may be proper to carry out the final judgment of that court, is silent as to what should be done in the interim between the adjudication by the Circuit Court of Appeals and the final adjudication by the Supreme Court. It must of necessity be still a pending suit, and the parties must, by the terms of the Act of 1891, be subject to the final adjudication of the Supreme Court."

In this state of the law, the Circuit Court holds that it will withhold its action upon appellee's motion *until* it can be directed and instructed by this court.

The second paragraph of section 6 of the Court of Appeals Act provides:

"And excepting also that in any such case as is hereinbefore made final in the Circuit Court of Appeals, it shall be competent for the Supreme Court to require by *cer-*

*tiorari* or otherwise; any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court,"

Section 10 provides among other things:

"That whenever on appeal or writ of error or otherwise a case coming directly from the District Court or existing Circuit Court shall be reviewed and determined in the Supreme Court the cause shall be remanded to the proper District or Circuit Court for further proceedings to be taken in pursuance of such determination."

Under these provisions, upon the removal of a cause from the Court of Appeals to this court for review, by writ of *certiorari* or otherwise, this court acts directly with the trial court, in the same manner it would have done had such cause been brought directly from such trial court.

Thus the Court of Appeals, in that class of cases, is eliminated, leaving the Circuit Court directly subject to the supervision of this court, and this court now acts upon the record and the Circuit Court as though the Court of Appeals act did not exist.

It would seem too clear to require argument that this and not the Court of Appeals must protect the *status* of the case in the Circuit Court, so that its mandate upon its final judgment will not become incapable of enforcement in any degree or matter.

## II.

At common law the Superior Court not only issued its writ of *certiorari* to the inferior court, but also sent to such inferior court its mandate for enforcement of its final judgment. As we have shown, this cannot be done under the Circuit Court of Appeals act.

The practice at common law however, was to apply to the Superior Court issuing the writ for orders necessary to maintain the status of the case pending the review by the Superior Court of the record brought to it by its writ of *certiorari*.

In *Bilderback v. Moore*, 17 N. J. L. (2 Harrison), page 510, after an execution had been issued in the trial court, the Superior Court issued a writ of *certiorari*, and, on motion, entered a rule to stay proceedings on the execution.

The same rule was entered, on motion, in *Allen v. Shurts*, 16 N. J. L. (1st Harrison), 221.

It cannot be said that if the trial court acts upon the mandate of the Circuit Court of Appeals before this court issues its writ of *certiorari*, the petitioner for the writ loses his right to have his case reviewed thereon by this court. If that were true his right to such review under the Circuit Court of Appeals act would depend upon the race between the losing and winning litigant. If the latter should reach the trial court with his mandate and secure entry of order for its enforcement, even a day before the former could reach this court with his record for application for supersedeas made to stay, etc., his right would be determined.

This court having determined the right of appellee to the writs of *certiorari*, and therefore its right to a review and final determination of causes in this court, is it not clearly entitled to the allowance of this motion, and thus place its bill back upon the docket of the Circuit Court to remain pending the final action of this court?

Observe that the order of dismissal, and the motion to vacate the same were entered and made at the same term.

*Doss v. Tyack*, 14 How., 428.

*Bronson, etc. v. Schultz, et al.*, 14 Otto,  
797.

## III.

Did not the stipulated record and the agreement of counsel for appellants, that if the writs of *certiorari* were ordered the causes should be reviewed and determined by this court thereon, constitute an express agreement to suspend any action by appellant upon the mandate of the Circuit Court of Appeals?

This court, upon the stipulated record, having determined the right of appellee to the writs of *certiorari*, and that, therefore, it was entitled to a review and final determination of these causes, is it not clearly entitled to the allowance of this motion by virtue of these stipulations, without reference to the Circuit Court of Appeals act?

The stipulation here presented, as performed, operated to transfer the record from the Circuit Court of Appeals to the Supreme Court, not only for the application for writ of *certiorari* but for final hearing upon the merits in case the writ was issued, and this transfer was, by agreement of the parties, completed November 9, 1896, the date of its filing in the Supreme Court. Such record when certified and filed in the Supreme Court pursuant to this stipulation was as provided therein to remain for two purposes: (1st) for the petition for the writ, and (2d) for review by the Supreme Court in case the writ was allowed.

We submit that even if it had been the settled practice that appellee upon its application to this court for the issuance of the writs of *certiorari* should at the same time

have moved for the immediate issue of an order staying the mandates of the Circuit Court of Appeals pending such application, these stipulations and adherence thereto by counsel for appellants would have rendered such motion unnecessary.

Without in any degree imputing any unfairness on the part of counsel in their subsequent insistence for judgment of dismissal upon the mandate of the Circuit Court of Appeals, we submit that the motion upon such mandate to dismiss was not in accord with the stipulation. On the contrary, it would seem clear that such motion and its allowance would tend to defeat or complicate one of the purposes expressed in the stipulation, because the only purpose counsel could have in obtaining the dismissal was to get the case out of the jurisdiction of the Circuit Court, or beyond the effect of the remanding order of this court in case it should reverse the judgment of the Circuit Court of Appeals and affirm the decree of Circuit Court. At least it does not seem consistent with the agreement in the stipulation that the case should be heard on the record as agreed, and provided for, to move upon the mandate in the Circuit Court after such agreed record had been filed in the Supreme Court.

Clearly such dismissal of the bill could have no other purpose or intended effect than to avoid at least the suspensive force of the issuance of the writ of *certiorari*.

We again disaffirm any purpose here to charge counsel in the least decree with any intention on their part to unfairly violate or disregard the terms of the stipulation. But we can not see otherwise than that the motion and judgment of dismissal would, of necessity, operate to defeat

the express purpose of the stipulation as above shown, especially if such judgment of dismissal is to have the effect of setting the defendants to the bill free to pursue any possible remedy or to take any possible step touching the subject-matter of this litigation, which they could not have pursued or taken if the judgment of dismissal had not been entered and the writ of *certiorari* did not suspend the mandate of the Circuit Court of Appeals.

It is manifest that the New Albany Company is entitled to have this judgment of dismissal vacated that they may have the full benefit of the writ and the review and ultimate decision of the Supreme Court upon the merits, without subjecting itself to any of the possible complications that might occur, if the judgment of dismissal continues in full force and effect beyond the term of its entry.

Respectfully submitted.

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